

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

UNITED STATES OF AMERICA)	<u>UNDER SEAL</u>
)	
v.)	Crim. No. 01-455-A
)	
ZACARIAS MOUSSAOUI,)	
Defendant)	

RENEWED EXPEDITED MOTION OF THE UNITED STATES FOR CLARIFICATION
REGARDING THE APPLICABILITY OF LOCAL CRIMINAL RULE 57 TO
INFORMATION TO BE MADE PUBLIC IN CONGRESSIONAL PROCEEDINGS,

The United States of America, by its undersigned attorneys, seeks an order clarifying the coverage of this Court's Local Criminal Rule 57 ("Local Rule" or "Rule 57") concerning disclosure of information about defendant Zacarias Moussaoui through testimony by Department of Justice officials in public congressional proceedings. We are renewing and relying upon our prior motion on this subject because the congressional committees investigating the facts and circumstances surrounding the September 11, 2001 attacks have notified us that there is a substantial likelihood that Justice Department witnesses will, beginning as early as September 24, 2002, be expected to answer questions in public congressional hearings about defendant, and thereby disclose information covered by the plain terms of Rule 57.

These congressional committees and the Department of Justice have different understandings of this Court's view of the responsibilities of the Justice Department witnesses in public congressional hearings in light of Rule 57. Notices we have newly received from the congressional committees concerning the testimony they expect from these witnesses make clear

that this matter is now ripe for this Court's consideration.

As discussed below, based on this Court's previous statements and the plain language of Rule 57, the government believes that public release by the Department of Justice of the information at issue involving defendant in the planned public congressional hearings would violate Rule 57. A question has arisen as to whether such public release is somehow authorized because testimony is requested by Congress. The government's main concern in this matter is to define our obligations under Rule 57 so that the government's ability to prosecute defendant consistent with constitutional requirements is not jeopardized. Justice Department officials intend to respond to congressional inquiries to the fullest extent possible, while not running afoul of this Court's rules and orders, inadvertently infringing defendant's constitutionally guaranteed trial rights.

Based upon the hearing schedule provided by the Joint Committees Inquiry Staff, the United States requests an expedited hearing on its motion. Because its content reveals information about defendant, which arguably falls within the scope of Rule 57, this motion is being filed under seal. However, in light of the Court's prior orders on the earlier aspect of this motion, we are serving a copy on the Counsel for the Joint Committees, and we urge that Congress be heard by this Court on these issues.

In support of this motion, the United States states as follows:

Local Criminal Rule 57

Rule 57 of the Eastern District of Virginia provides that, in connection with all pending criminal litigation in this district, "it is the duty of [a lawyer or law firm associated with the litigation] not to release or authorize the release of information or opinion (1) if a reasonable

person would expect such information or opinion to be further disseminated by any means of public communication, and (2) if there is a reasonable likelihood that such dissemination would interfere with a fair trial or otherwise prejudice the due administration of justice.” LCrR 57(A).

The Local Rule then sets forth several categories of information that the law firm “shall not” release or authorize the release of extrajudicially until the termination of trial, including “the character or reputation of the accused”; “[t]he existence or contents of any confession, admission, or statement given by the accused, or the refusal or failure of the accused to make any statement”; “[t]he performance of any examinations or tests or the accused’s refusal or failure to submit to an examination or test”; “[t]he identity, testimony, or credibility of prospective witnesses” (other than the victim); and “[a]ny opinion as to the accused’s guilt or innocence or as to the merits of the case or the evidence in the case.” Id. at 57(C).

The Local Rule also provides, however, that “[n]othing in this Rule is intended * * * to preclude the holding of hearings or the lawful issuance of reports by legislative, administrative, or investigative bodies * * *.” Id. at 57(E).

The Joint Congressional 9/11 Inquiry

As we described in our Expedited Motion of the United States for Clarification Regarding the Applicability of the Protective Order for Unclassified but Sensitive Material and Local Criminal Rule 57 to Information That May be Made Public in Congressional Proceedings, filed on August 19, 2002, the Select Committee on Intelligence of the United States Senate and the Permanent Select Committee on Intelligence of the United States House of Representatives (the “Committees”) are conducting a Joint Inquiry into the terrorist attacks committed against the United States on September 11, 2001. As this Court is aware, the Department of Justice has

confidentially provided a large mass of material about defendant to the Joint Inquiry, and the Committees have notified us of their intention to hold public hearings in which they will explore that material and question Justice Department witnesses about it.

The Court addressed our previous motion in a hearing on August 29, 2002. During the hearing, the Court noted that “rule 57 also clearly says that it does not apply to legislative proceedings, so as to the extent that the United States Congress feels it’s in the best interests of everybody at this time to conduct those hearings in public, I don’t see anything in rule 57 that gives me the authority to tell Congress they can’t do that.” Transcript of Aug. 29, 2000 Hearing, at 12. Government counsel accordingly raised whether the Court was ruling that government officials “will not be violating rule 57 then if they answer questions” during open Congressional hearings,” and the Court responded: “No, that’s not what I’m saying.” Id. at 15. The Court explained that Justice Department officials, including those at the FBI, are covered by Rule 57, and that, to the extent any of these witnesses would provide testimony concerning “his opinion about the guilt of the defendant[:] That’s not proper for that to be stated publicly.” Id. at 16.

The colloquy between the Court and government counsel concluded in the following way:

“MR. LETTER: Your Honor, then it seems to me we * * * have gotten the answer that we asked for from the Court. You are ruling that the Justice Department people continue to be covered by Rule 57 –

THE COURT: Right.

MR. LETTER: – and as they testify in Congress, they continue to be covered by rule 57, and we will abide by that order, and we will act accordingly * * *.”

Id. at 17.

Later, the Court further explained that “you can’t have a Justice Department official

making an editorial comment about the merits of the case, which in spirit that's a clear violation of the rule, and being protected from the rule because he made it in a legislative forum." Ibid.

The Court then concluded this subject by saying that "I don't intend in any way to interfere with what Congress is interested in getting, because it's my understanding what you want to get would, in fact, really not violate rule 57, and I hope that is correct. * * * Rule 57 is in place, so neither, neither defense counsel or the government can go off and start publishing exhibits or whatever to the press." Id. at 22.

Counsel for the Committees proposed clarification at that point in the hearing, but the Court indicated that it would not then rule further; it did explicitly assure the hearing participants, however, that it would be available to resolve disagreements if "specific issues" arise in "a more concrete manner." Id. at 26-27.¹

With regard to both Local Rule 57 and the Protective Order, the Court essentially ended the hearing by stating that it was putting the government "on clear notice as to the dangers and risks that are out there [from public disclosure of information], and you're all going to proceed on your own. As long as you don't violate any orders or rules of this Court, I'm not going to

¹ When standby counsel complained that the government had already provided substantial documentary material to the Committees, the Court correctly recognized that "[a]h, but that was all done in a sealed or closed environment." Id. at 31. Standby counsel also said that "if there's prejudice that occurs to Mr. Moussaoui as a result of any of this information becoming public and testimony being made up on the [Capitol] Hill, questions such as Director Mueller's being asked and answered up on the Hill, we reserve the right completely to bring that back to the Court's attention for whatever relief there may be." Id. at 32.

have anything to say.” Id. at 33 (emphasis added).²

This Renewed Motion in Light of the Concrete Nature of the Issues at Hand.

This matter is now manifestly concrete. Following the August 29 hearing, the Committees have provided additional information about the focus of an open hearing they plan to hold on September 24. The Staff Director for the Joint Inquiry has also provided us with her draft statement to be delivered at the September 24th hearing, which recites in detail information about defendant and his associates.³ This statement is believed to be intended for use to frame the issues for the Members of Congress for their consideration at this hearing. Based on the invitation letter, FBI witnesses are expected to testify about these matters in the public congressional hearings.

In addition, in a September 11, 2002 letter, the General Counsel for the Joint Inquiry provided the Justice Department with a list of documents directly involved in the pre-September 11 investigation of defendant (previously given privately to the Committees by the Justice Department), and advised us that “there is a substantial likelihood that questioning of FBI witnesses at a public hearing may be directed at matters raised by [the documents].” These documents concerning defendant contain a plethora of information covered by Rule 57.⁴

² The Court also indicated in response to an inquiry from the government that, because the Intelligence Community (aside from the FBI) is not part of the Department of Justice, “they’re not literally covered by [Rule 57] * * *.” Id. at 24-25.

³ This classified document is available for the Court upon request.

⁴ A copy of the September 11, 2002, letter is Attachment A to this motion. A copy of the FBI documents listed in the letter is Attachment B to this motion; those documents will be cited herein by the Bates-number (“FBI” followed by five numbers) printed in the bottom-right corner.

A prime example is an internal FBI report dated August 18, 2001, which details the investigation of the defendant conducted beginning on August 15, 2001. See FBI 01903-01923. The report explains that agents interviewed the defendant on two occasions after his arrest, search, and detention in an INS facility. The report describes in considerable detail the defendant's statements and his failure to provide statements on certain subjects, as well as the agents' impressions of the interviews and the defendant, noting at the outset that "Moussaoui was extremely evasive in many of his answers given during the course of this and one subsequent interview." FBI01910. The defendant discussed his suspicion of immigration authorities, his travel to the United States to enroll in flight school, his reasons for not attending a flight school in Europe, his desire to fly a large jet aircraft, his sources of income and his business, his connections in Saudi Arabia, his relationship with his family, and his recent travel to Pakistan, Malaysia, and Indonesia. FBI01910-13. The report notes that, when the defendant was asked about his travel to Pakistan, "[t]his line of questioning caused him to become extremely agitated and he refused to discuss the matter further." FBI01913. The document further states that, "[a]t no time during this or one subsequent interview was Moussaoui able to give a convincing explanation for his source of income, especially considering that each of the business ventures he described 'did not work out.' * * * [Moussaoui] became angry when it was suggested to him that this did not seem adequate to account for the large sums of money in his possession." FBI01912.

This document continues by describing statements made by the defendant during his second interview, reporting that, "[a]lthough Moussaoui began this second interview in a very subdued manner, in an attempt to appear cooperative, as the questions began to touch on the gaps in his financial support, his reasons for training at Pan Am and his religious beliefs, he became

increasingly angry. He was again unable to convincingly explain his source of income, now indicating that the money came from friends in the [United Kingdom].” FBI01917. Finally, the report describes how, after the defendant was confronted with “information that he was known to be an extremist intent on using his past and future aviation training in furtherance of a terrorist goal,” he “invoked his right to ‘an immigration lawyer’ and questioning was halted.” FBI01918.

This same FBI document also discusses an interview of one of the defendant’s flight instructors -- a prospective trial witness -- concerning, among other things, the defendant’s desire to learn to pilot a large aircraft and to be able to fly it from London to New York. FBI01900-02. It also describes in depth two interviews of a friend of defendant’s from Oklahoma, who was with him when the defendant was arrested in Minneapolis and who is another prospective trial witness. FBI01904-10, FBI01915-17.

The FBI document also describes the arrest of the defendant and the items located on his person, as well as items located in the hotel room he shared with his friend. FBI01903-04. The document discusses the Minneapolis FBI’s assessment of the defendant at that point -- “Moussaoui is an Islamic fundamentalist preparing for some future act in furtherance of radical fundamentalist goals” involving an aircraft. FBI01918-19.

The subsequent documents are largely communications between FBI Minneapolis and FBI Headquarters involving analysis of the evidence developed to date and various agents’ assessments of the defendant, including one agent’s supposition that the defendant, if released, might take control of an airplane and crash it into the World Trade Center. FBI1184.

Thus, the issue raised at the August 29 hearing concerning the scope of Rule 57 on which the Court ruled generally, has now become specific and concrete. The Committees’ September

11 letter makes clear that, possibly as early as September 24, the Committees expect Justice Department witnesses to testify before print and broadcast media in public congressional hearings about the contents of statements made by the defendant, his refusal at one point to make further statements in light of a troubling line of inquiry, the character or reputation of the defendant, the identity of prospective witnesses against him, the testimony of prospective witnesses, and the opinions of federal officials about the merits of the case and the evidence in the case as it stood in the pre-September 11 period.

The Department's view is that these are all subjects expressly covered by subsection (C) of Rule 57. The Joint Inquiry Staff have expressed a different, narrower construction of Rule 57. For that reason, and given that now we have been provided with particular documents that will form the basis of questioning of Department personnel at the public congressional hearings, we are renewing our motion and seeking a ruling from this Court on these issues.

The government is not suggesting in any way that this Court should direct any order against the Congress. Rather, we have indicated merely that, if this Court believes that specified material – which could interfere with the government's ability to proceed with a prosecution of defendant or impinge upon the defendant's constitutionally protected trial rights – should not be publicly disclosed at this time because of Rule 57, the Department of Justice will take steps to

ensure that this Court's rule is not violated by government officials as they testify.⁵

An order from this Court adopting the government's interpretation of Rule 57 would not prohibit Congress from holding public hearings on this matter now or in the future. It would only limit the nature of the Department witnesses' responses to particular questions prior to the defendant's trial. After the defendant has received the fair trial that is his right, the concerns raised by extrajudicial disclosure of this information will no longer exist.

We note too that there are many important subjects being investigated by the Committees that will not be publicly disclosed, because they involve classified information.

Request for Sealing, Participation by the Committees, and Expedited Consideration

This motion is being filed under seal because it discusses the very type of information the Department believes is forbidden from public disclosure by Rule 57. In addition, because this is the renewal of a prior sealed motion that the Court allowed us to provide to the Counsel for the Committees, we are once more serving a copy on the Committees' Counsel. We believe it appropriate for the Court to invite the Committees to file a response to this motion, and that the Committees' representative be allowed to address the Court during any hearings on this motion.

Because the Committees' relevant public hearings are expected to begin as early as September 24, the Department requests that the Court expedite consideration of this motion.

⁵ In Delaney v. United States, 199 F.2d 107 (1st Cir. 1952), the court overturned a conviction of a defendant who had been the subject of highly publicized congressional hearings. The court explained that Congress acted within its authority in holding open hearings while the defendant was under indictment, and that this meant his trial should have been delayed until a fair trial could be held. *Id.* at 113-16. We note, though, that the Delaney opinion did not concern prejudicial testimony by Justice Department officials, but instead focused on prejudicial comments and testimony by Members of Congress and non-Department witnesses, including witnesses in the criminal proceedings.

Conclusion

For the reasons set forth above, the United States respectfully requests that the Court issue an Order clarifying that Local Criminal Rule 57 governs Department witnesses appearing before congressional panels in public or open sessions, insofar as their statements or answers to questions touch on the areas identified in subsection (C) of that rule.

The Department also respectfully requests that the Court invite the Committees to file a response to this motion, if they wish. Because of the scheduled timetable for the Committees' public hearings, the Department requests that the Court expedite consideration of this matter. A proposed Order is attached for the Court's consideration.

Respectfully submitted,

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